Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1046

JOHN J. GIRARD, et al.,
Petitioners,

v.

GORDON D. SCHWEITZER, Sheriff of the City of St. Louis,
Successor to BENJAMIN GOINS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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December .., 1978

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INDEX

	Page
Opinion Below	2
Jurisdiction	3
Questions Presented	3
Statement of the Case	3
Reason for Granting the Writ	5
The Petitioners Are Entitled to an Evidentiary Hearing	5
Conclusion	6
Appendix "A"—A chronological list of all relevant litigation orders, events, etc.	A-1
Appendix "B"—Petitioners' Motion for Rehearing, etc. filed in Missouri Court of Appeals in September, 1977, in response to decision now reported as Girard v. Percich, 557 S.W. 2d 25 (1977 Mo. App.)	A-4
Appendix "C"—Petitioners' Application for Stay to U.S. Supreme Court Associate Justice Blackmun with attached exhibits	A-18

CITATIONS

Cases:

Frankel v. U.S., 131 F2d 756 (6th Cir. 1942)	A-24
Girard v. Goins, 575 F2d 160 (8th Cir. 1978)	A-19
Girard v. Percich, 557 S.W. 2d 25 (Mo.App. 1977)	5, A-19, A-23
Hendricks v. Meatcutters Union, 95 LRRM 2706	A-12, A-15

Huff, ex parte, 516 S.W. 2d 778 (Mo. App. 1974) A-24

Miles, ex parte, 406 S.W. 2d 107 (Mo. App. 1966) A-24

Milk Union Drivers v. Meadowmoor Dairy Co., 312 U.S. 287, 61 S.Ct. 552 (1941) A-7

Neal, ex parte, 507 S.W. 2d 674 (Mo. App. 1974) A-24

Parks, State ex rel. v. Barker, 567 S.W. 2d 130 (Mo. Banc. 1978) A-23

Randolph, In re, 474 S.W. 2d 36 (Mo.App. 1971) A-24

Miscellaneous:

Title 28 U.S.C. section 1254(1) 3

Title 28 U.S.C. section 2254 .....3, 5, A-24, A-26

Title 29, U.S.C. section 107 (Norris-LaGuardia Act) ..6, A-10

Wright and Graham, Federal Practice and Procedure, Volume 21, pages 334-5 ..... A-6

Missouri Rules and Statutes:

Rule 27.22, Mo. Rules, Criminal Procedure A-23

Rule 75.01, Mo. Rules, Civil Procedure A-23

Rule 81.05, Mo. Rules, Civil Procedure A-23

Rule 91.39, Mo. Rules, Civil Procedure A-14

Section 476.110, Mo. Revised Statutes A-11

Section 556.130, Mo. Revised Statutes A-14

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GORDON D. SCHWEITZER, Sheriff of the City of St. Louis,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The petitioners, JOHN J. GIRARD, JOHN E. TAYLOR, EUGENE P. GROSSMANN, CHARLES E. KELTING, LOUIS E. FELDHAUS, DUDLEY ALSOP, RONALD McKENZIE, WRAY HAMBRICK, MICHAEL MANION, JERRY BECHT, RON HOSFELD, respectfully pray that a (consolidated) writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 29, 1978 (U. S. Court of Appeals for the Eighth Circuit, No. 78-1700).

OPINIONS BELOW

The relevant opinion of the Court of Appeals is reported in 575 F.2d 160 (May, 1978). On remand, the U. S. District Court for the Eastern District of Missouri, Eastern Division (St. Louis, Missouri) entered its further Orders, not reported, as referenced in Appendix "A" hereto and as shown in Appendix "C" hereto. As provided in the said U. S. District Court Orders, the Circuit Court for the City of St. Louis (hereafter, the "State trial court") amended the criminal contempt sentences of these petitioners to conform to the provisions of the decision of the Eighth Circuit Court of Appeals (575 F.2d 160, supra) and the June 26, 1978 Orders of the U. S. District Court.

Following the amendment of the criminal contempt sentences by the State trial court on July 18, 1978, these petitioners sought further relief in the U. S. District Court (St. Louis). The Orders of that Court, denying relief, entered on September 25, 1978, are referenced in Appendix "A" hereto and contained in Appendix "C" hereto. The Eighth Circuit Court of Appeals refused to find probable cause for appeal of the September 25, 1978 Orders of the U. S. District Court (St. Louis) on September 29, 1978 (Eighth Circuit Order attached to Appendix "C").

On October 2, 1978 these petitioners moved Justice Blackmun of this Court for a stay of their confinement (U.S. Supreme Court No. A-295). This application is Appendix "C" hereto. Justice Blackmun denied the application for a stay order on October 3, 1978.

A chronological index of the State trial court criminal contempt litigation and the five (5) separate related habeas corpus proceedings in the Missouri Appellate Courts and the federal Courts appears in Appendix "A" hereto.

JURISDICTION

The final Orders of the U. S. Court of Appeals for the Eighth Circuit, denying further relief to these petitioners, were entered on September 29, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Can a State trial court judgment and sentence, fixing guilt and punishment for criminal contempt of court, be amended and re-amended by the State court trial Judge two (2) years after the State trial court has lost jurisdiction, without violating the constitutional rights of due process of the defendants?

2. Does 28 U.S.C. 2254 (d) require an evidentiary hearing when the habeas petitioners, in five (5) separate habeas proceedings, have disputed the procedure, the materiality, the jurisdiction, the fairness and adequacy and the lack of evidence which convicted them in a State court criminal contempt proceeding, tried without a jury?

STATEMENT OF THE CASE

The essential facts relevant to this statement are set out in the petitioners' Application for a stay of the jail commitment orders of the Circuit (State) Court of the City of St. Louis, Missouri directed to an Honorable Harry A. Blackmun, Associate Justice, filed in this Court on Monday, October 2, 1978 (No. A-295) (Appendix "C" hereto) and denied by Justice Blackmun on Tuesday, October 3, 1978. The petitioners

will not burden this statement by any repetition of the matters and arguments set out in the application to stay and respectfully request that the said stay application and the exhibits attached thereto be adopted and incorporated into this petition for a writ of certiorari. The entire stay application and its exhibits are included herein as Appendix "C".

REASON FOR GRANTING THE WRIT

The Petitioners Are Entitled to an Evidentiary Hearing.

Section 2254 of Title 28 U.S.C. provides specific remedies in Federal Courts to a prisoner in state custody. Sub-paragraph (d) of Section 2254 sets out eight (8) grounds which must be considered in order to grant a state prisoner an evidentiary hearing in the federal court. Rule 8 of the 1977 Rules Governing Section 2254 Cases describes the mechanical procedures of the U. S. District Court Judge if he determines that an evidentiary hearing is required in the habeas proceeding. The eleven (11) petitioners have NOT been granted an evidentiary hearing in any of their four (4) separate habeas petitions in the Missouri Appellate Courts or their fifth (5th) (and present) habeas petition in the Federal Courts. The reported decision of the Eighth Circuit Court of Appeals, 575 F.2d 160 (1978), which mandated a remand to the District Court to grant a writ of habeas corpus unless the State trial court amended its sentences (by reducing the monetary fines), covered the question of an evidentiary hearing at page 165 of 575 F.2d in the area designated as II of the opinion. The opinion states:

> "We cannot agree that there is a total lack of evidence to support petitioners' criminal contempt convictions. See State ex rel. Girard v. Perpich (sic), supra."

The referenced authority, State ex rel. Girard v. Percich, is the fifteen (15) page decision of the Missouri Court of Appeals entered on August 30, 1977 (557 SW 2d 25, Mo. App. 1977) adjudicating the first habeas petition filed by these petitioners on June 25, 1976. NO EVIDENTIARY HEARING WAS CONDUCTED IN THIS PROCEEDING. The petitioners filed a fourteen (14) page motion for rehearing, in response to the Missouri Court of Appeals decision, which analyzed an entire spectrum of erroneous findings and conclusions therein,

including the fact there was an absolute, total lack of evidence to support the criminal contempt convictions, especially of the six (6) Union Officers. This motion was summarily denied. In order to point up the plight of these petitioners the entire motion for rehearing to the Missouri Court of Appeals is reprinted and annexed to this petition as Appendix "B". The petitioners urge this Court to review the Missouri Court of Appeals decision (557 SW 2d 25) in light of the analysis of that decision in the rehearing motion (Appendix "B"). This analysis will clearly reveal that these petitioners have been unjustly, systematically, repeatedly denied the benefit of an evidentiary hearing which will enable them to firmly establish, in a proper record, the total lack of any relevant evidence to sustain their criminal contempt convictions.

The 1978 amendments and re-amendments to the 1976 sentences and judgments of guilt imposed onto petitioners by the State trial court, which had lost all jurisdiction over these petitioners for two (2) solid years, is a further, compelling reason why this Court must now also enforce the provisions of Section 2254 (d) (4) of Title 28—"that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding" and determine if these eleven (11) petitioners should have had the benefit of an evidentiary hearing in the U.S. District Court, by granting its Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals denying proper habeas relief to these petitioners.

CONCLUSION

For these reasons, and those specified in the petitioners' prior application for stay (Supreme Court No. A-295, Appendix "C"), a writ of certiorari should issue to review the September 29, 1978 judgment of the Eighth Circuit Court of Appeals

denying relief to these habeas corpus petitioners, or, alternatively, the petitioners pray for the issuance of the summary Orders of this Court to the Eighth Circuit Court of Appeals directing that Court to note probable cause to grant petitioners' appeal and to then immediately remand this matter to the U.S. District Court to conduct an evidentiary hearing on all of the issues described herein.

Respectfully submitted,

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December 26th, 1978

Certificate of Service

I hereby certify that on this 26th day of December, 1978, three copies of the Petition for Writ of Certiorari were personally delivered to John P. Emde, Esq., 611 Olive Street, Suite 1950, St. Louis, Missouri 63101, Counsel for Respondent. I further certify that all parties required to be served have been served.

JEROME J. DUFF
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APPENDIX

APPENDIX A

April, 1976—Injunction actions filed in Circuit Court, City of St. Louis, Missouri, by Lohr Company and Grey Eagle Company (St. Louis Area beer distributors) against Teamster Local No. 133, Beer Drivers, etc. (Beer delivery Union). Temporary restraining orders issued;

May, 1976—Motions to cite Union Officers for contempt filed;

June, 1976—Hearings in contempt action;

June 24, 1976—State trial court enters Orders finding 12 Union Officers and members guilty of contempt and sentences them to varying jail terms and/or fines ranging from $2,500.00 to $10,000.00;

June 25, 1976—Missouri Court of Appeals, St. Louis District issues a preliminary writ of habeas corpus (habeas petition No. 1);

August 30, 1977—Missouri Court of Appeals releases one of the twelve contemnors (Woodson) and denies Writs of habeas corpus to the remaining 11 contemnors (State ex rel. Girard, et al. v. Percich, 557 SW 2d 25 Mo. App. 1977);

September 12, 1977—Petitioners (contemnors) motion for rehearing filed (Appendix "B" herein), this motion denied October 11, 1977;

October 12, 1977—Petitioners (contemnors) file petitions for Writs of Habeas Corpus, Missouri Supreme Court (habeas petition No. 2);

January 4, 1978—Missouri Supreme Court mandate denying writs filed;

January 10, 1978—Petitioners file petitions for Writs of Habeas Corpus in U. S. District Court, St. Louis, Missouri (habeas petition No. 3);

January 11th, 1978—U. S. District Court denies Writs;

January 11th, 1978—Petitioners' appeal to the U. S. Court of Appeals for the Eighth Circuit;

January 23rd, 1978—Court of Appeals finds probable cause and grants appeal;

April 13, 1978—Court of Appeals remands to U. S. District Court with instructions to issue Writs if fines imposed are not reduced to $500.00 for each contemnor; 575 F.2d 160 (1978);

June 26, 1978—U. S. District Court issues Orders to reduce fines to $500.00 each, or grant new trials, or Writs will issue;

July 18, 1978—State trial court amends sentences and reduces fines to $500.00 each and further amends judgment of contempt by eliminating contemnors liability for Special Prosecutor's legal fees;

July 18, 1978—Petitioners file petitions for Writs of Habeas Corpus in Missouri Court of Appeals, St. Louis District, habeas petition No. 4;

July 19, 1978—Missouri Court of Appeals denies petitions for Writs;

July 20, 1978—Petitioners file petitions for Writs of Habeas Corpus in Missouri Supreme Court, habeas petition No. 5;

September 12, 1978—Missouri Supreme Court denies petitions for Writs;

September 18, 1978—Certain petitioners commence to serve jail sentences;

September 18, 1978—Petitioners Manion, Bech, Hambrick and Hosfeld pay fines of $500.00 each, under protest;

September 25, 1978—U. S. District Court (St. Louis) denies further relief to petitioners;

September 25, 1978—Petitioners file notice of appeal to U. S. Court of Appeals for Eighth Circuit;

September 29, 1978—Eighth Circuit denies probable cause for appeal, thereby denying appeal;

October 2, 1978—Petitioners file application for stay of jail confinement orders in U. S. Supreme Court (No. A-295) to Honorable Harry A. Blackmun (Appendix "C" herein);

October 3, 1978—U. S. Supreme Court Associate Justice Harry A. Blackmun denies application for stay (No. A-295). This application included attached exhibits 1 through 6 which are copies of the relevant Orders entered from June 26, 1978; to date;

November 3, 1978—All petitioners completed their jail sentences.

APPENDIX B

(Note to Appendix "B". All of the page numbers in the Motion are to 557 SW (2) 25 to 40.)

In the Missouri Court of Appeals
St. Louis District
Division Three

State ex rel., Girard, et al., Petitioners, vs. Raymond T. Percich,[1] Sheriff of the City of St. Louis, Respondent.	Cause Nos. 38,271, 38,272, 38,273, 38,374, 38,275, 38,276, 38,277, 38,837, 38,838, 38,839, 38,840, 38,841.

PETITIONERS' MOTION FOR REHEARING AND/OR TO TRANSFER EN BANC TO THE ST. LOUIS DISTRICT OF THE MISSOURI COURT OF APPEALS

Habeas Corpus petitioners move the court to rehear their petitions (consolidated) for discharge from the confinement imposed upon each of them arising out of a contempt proceeding in Division No. 3 of the Circuit Court of the City of St. Louis (Honorable Carl R. Gaertner).

This motion for rehearing is filed pursuant to Rule 84.17.

Alternatively, the petitioners move the court to transfer this proceeding to the St. Louis District of the Missouri Court of Appeals en Banc pursuant to Rule 84.15.

Petitioners move for rehearing on the following grounds:

---

[1] Respondent Percich has been succeeded in office by Benjamin Goins.

I. The opinion of the court was filed on August 30, 1977. This consolidated application in habeas corpus originally involved thirteen (13) separate writs brought in behalf of twelve (12) petitioners. This court's opinion and order of August 30, 1977, quashed the court's writ of habeas corpus as to eleven (11) of the twelve (12) petitioners (Girard, 38,271; Taylor, 38,272; Feldhaus, 38,273; Kelting, 38,274; Grossmann, 38,275; Alsop, 38,276; McKenzie, 38,277; Becht, 38,837; Hambrick, 38,838; Hosfeld, 38,839; Manion, 38,840; McKenzie, second application, 38,841). Petitioner Woodson (38,278) was ordered to be discharged.

II. The twenty-two (22) page opinion of the court references the following episodes which were pleaded and/or litigated in the course of the contempt proceeding and resulted in acquittal of the fifty-five (55) Union members who were identified and/or charged in those episodes:

Page 28, footnote No. 2, the references to a "firebombing" and "threats".

Page 29, the references to "trucks . . . attacked"; "truck . . . caused to overturn"; "offices . . . ransacked"; "telephone threats . . . against . . . lives"; "home . . . firebombed."

Page 30, the references to "trucks . . . attacked . . . with . . . dangerous projectiles"; "windows of . . . vehicles . . . shattered"; "concrete poured into . . . plumbing"; "direct threats against customers"; "armed security guards carried weapons"; "armed caravans"; "pursued by car loads of strikers"; "dangerous traffic violations to escape pursuers"; "flee at speeds in excess of lawful limits"; "driving the wrong way on one way streets."

Page 35, the references to "customer . . . followed from Lohr's by three or four carloads of strikers"; "maneuver their vehicles in front of his trucks"; "drive at speeds of less than five

miles per hour"; "jam on their brakes"; "come to complete halts in traffic lanes"; "trucks intermittently bombarded"; "roofing nails . . . strewn . . . on roadway."

A. No convicted contemnor was implicated in any of the above episodes. All of the above references are immaterial and irrelevant in this habeas corpus proceeding and have no bearing on any issue before this court. This evidence must, therefore, be restricted "to its proper scope." (See copy of Section 5067, Federal Practice and Procedure, Wright and Graham 1977, Volume 21, pages 334, 335, attached; see also Rule 91.39).[2]

III. The court's opinion established a contradictory double-standard of evaluating evidence in this habeas corpus proceeding:

Page 30—"In reciting the facts we will not dwell on the many sordid incidents detailed in this voluminous record which did *NOT* (emphasis added) form the basis for contempt convictions".

Page 30—"It is within this context" (having recited many of the immaterial and irrelevant episodes identified in paragraph II, supra) that the evidence relating to the specific episodes leading to the contempt citations must be viewed."

Page 38—"Under these circumstances AND WITHIN THE CONTEXT OF THIS VIOLENT STRIKE (emphasis added) the court could find that these actions constituted obstruction 'done willfully and deliberately for the purpose of intimidating, coercing and harassing a customer' (Henkle) of Grey Eagle in violation of the restraining order."

Page 39—"We believe that given the evidence of PREVIOUS INCIDENTS OF VIOLENCE ACCOMPANYING THE FOL-

[2] Note for Petition for Certiorari to U. S. Supreme Court—: See later reference to this Rule at page A-14 of this Appendix "B".

LOWING OF PLAINTIFFS' CUSTOMERS' VEHICLES (emphasis added) and petitioner Girard's statement that bracketing would be wrong, the court could reasonably find that such action was deliberately undertaken for the purpose of intimidating and harassing Garanella in violation of the restraining order."

IV. The court's opinion established a contradictory double-standard for determining guilt in a criminal contempt prosecution:

Page 36—"The State, nevertheless, has the burden of proving the elements of criminal contempt beyond a reasonable doubt, just as in a criminal prosecution." (citations omitted).

Pages 39 and 40—The court's opinion is quoting, with obvious approval, from *Milk Union Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 61 S.Ct. 552 (1941) at 294 of 312 U.S. and 555 of 61 S. Ct. "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful". *At page 40*—"It was obvious from the testimony and was manifested to petitioners" (the Union officers) "by their conduct when subjected to it that the customers were uniformly frightened and intimidated by the Union's program of following."

A. This double-standard for determining guilt in a contempt prosecution results when the legal elements required for an INJUNCTION (*Milk Drivers Union v. Meadowmoor Dairies*, supra) are admixed into the legal elements of criminal contempt.

V. The court's opinion fails to clarify if guilt for contempt is predicated upon violations of the Lohr Company restraining order (April 22, 1976, page 28 of the opinion) or on the Grey Eagle Company restraining order (April 28, 1976, page 30

of the opinion). The opinion (page 28) speaks to "violations of a lawful restraining order" (singular) but does not state which of the two orders is deemed to be violated. It should be noted that the three (3) specific episodes of contemptuous conduct (Grey Eagle customers Henckle, opinion page 31; Hanneke, opinion page 31; and Santoro, opinion page 32) obviously reference only the Grey Eagle Company restraining order. The court's opinion at page 40 then states—"The members of the executive board were the deliberate instigators of acts of contempt and may be punished as such; the punishment meted out by the trial court was condign." Since the only specific "acts of contempt" referenced involve customers of Grey Eagle the involvement and guilt of the Union officers would appear to obviously be hinged only onto the Grey Eagle restraining order. Petitioners require a clarification of this point in order to, among other things, determine the rights of the Union's members and officers pursuant to Rule 92.11 (Dissolution of Injunction-Assessment of Damages).

VI. The contempt convictions and commitment of petitioners Hambrick, Becht, Manion and McKenzie (court opinion, pages 30, 31, 32, and 38) for blocking a truck for the purpose of intimidating, coercing and harassing Grey Eagle customer Henkle are not discharged even though the customer, Henkle, did not appear or offer any testimony in the contempt proceeding. This court states at page 31—"There was no explicit oral threat of violence communicated . . . and the conversation between the parties was described as peaceful." There was no act of violence or damage throughout this episode.

A. At page 38 of the court opinion it states— ". . . the court could find inherent intimidation, harassment and coercion." Insofar as customer Henkle is concerned such a finding must, of necessity, go far beyond "inherent", and becomes an act of mind-reading since he never appeared in the contempt hearing as a witness. This finding therefore violates even the most basic constitutional mandate of the right of confrontation.

B. The contempt trial judge repeatedly warned the Special Prosecutor, in other episodes early on in the course of the contempt hearing, "If this is what the customer believes it is incumbent on you (Special Prosecutor) to produce the customers to say so" (Tr. 336). "I (the court) think you are going to have to bring the customers in" (Tr. 338). In spite of this admonition to the Special Prosecutor, and the obvious reliance thereon by the petitioners, customer Henkle never appeared.

C. The conviction herein now rests solely on the testimony of truck driver Richard and this court's finding that he claimed that "two automobiles operated by unidentified persons pulled in front of them and blocked their path." (court opinion, page 31). The four (4) petitioners "maintain that no vehicles blocked Henkle's truck . . ." (court opinion, page 31). This contention is therefore sharply disputed. The failure of the Special Prosecutor to produce Henkle to testify thus requires the further inferential finding that Henkle's testimony regarding the issue of whether his truck was "blocked" would have been favorable to the petitioners and contrary to that of the driver, Richard, and the position of the Special Prosecutor in this episode.

VII. The contempt conviction and commitment of petitioner McKenzie (his second episode) for breaking a store window (court opinion pages 31, 32, 38 and 39) is not discharged (court opinion page 39). McKenzie's conviction thereby sets a new standard of criminal guilt wherein an isolated statement made to a police officer, even though vehemently denied by the maker, standing alone, is sufficient to convict.

A. A warrant application for breaking the window was made to the St. Louis County Prosecutor by the City of Glendale Police Department (Tr. 231-232). As of the date

of this motion for rehearing sixteen (16) months later, the St. Louis County Prosecutor has refused to act on the warrant application. The contempt trial judge thus successfully became the policeman, prosecutor, judge and jury when he chose to act in this case even though the involved police department was diligently pursuing its duties. Section 107 of the Norris-LaGuardia Act (Title 29, U.S.C. 107) mandates in subparagraph (e) that this type of conduct is only authorized by a court if it appears "That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

B. The court opinion states that Grey Eagle customer Hanneke ". . . was followed by unidentified strikers the entire route back to his store." (court opinion, page 31). This statement is incorrect. The parties who followed Hanneke (Hobin and Hambrick) were thoroughly identified throughout the contempt trial record (Tr. 211, 682, 704, 718, 1088, 1092). Hobin was tried and acquitted for this act of following. Hambrick was never charged in this episode. This fact is noteworthy in the further consideration of petitioner McKenzie's guilt as well as the finding of guilt on the part of the Union officers.

VIII. The contempt convictions and commitments of petitioners Manion and Hosfeld (court opinion 32, 32, 33 and 39) for "bracketing" Grey Eagle customer Garanella's truck are not discharged even though customer Garanella specifically stated that the ". . . vehicles of the strikers positioned themselves either intentionally or UNINTENTIONALLY (emphasis added), in any event positioned themselves in front of and behind him and to the side of him" (Tr. 1141).

A. Garanella's description of this bracketing as UNINTENTIONAL speaks eloquently for itself to deny that the actions of petitioners Manion and Hosfeld could, in any sense, have been WILLFULL. The applicable statute

(Section 476.110, subparagraphs 3 and 4) specifically mandates that the court may punish for criminal contempt only if there is "WILLFULL disobedience" or if there is "resistence WILLFULLY offered."

B. Garanella further testified that he picked up beer from Grey Eagle ". . . on more than one occasion during the strike after the Restraining Orders;" that he was followed "on one of the occasions;" (Tr. 1141) and, finally, "that nothing physically has happened to him enroute to or from Grey Eagle to his restaurant other than the following and the bracketing described on any of these occasions that I know of.", (Tr. 1142). There was no act of violence or damage throughout this episode.

C. *At page 39* the court comments regarding the Garanella episode as follows "It invited evasion tactics and retaliation by Garanella because of the fear it engendered in him. As such, it posed a great potential for harm to Garanella as well as other members of the public travelling on the same streets." This is the height of fantasy in this opinion. There is no remote inference or indication that Garanella ever considered much less undertook such tactics. He testified "that nothing physically has happened to him enroute . . ." as well as that in his opinion the so called bracketing could have resulted "unintentionally." The petitioners respectfully suggest that it is equally valid to fantasize that all of the acts of violence, the damage and the threats which occurred during the course of the entire strike were self-inflicted by the beer distribution companies in order to cripple and impede the legitimate purposes of the union in the conduct of the strike.

IX. The contempt convictions and commitments of the six (6) Union officer petitioners, Girard, Taylor, Kelting, Grossmann, Feldhaus and Alsop (court opinion, pages 33, 34-35, 35,

37, 39, 39, 40, 40) for adopting and promulgating the Union's policy of following customers from plaintiffs' places of business to their destination are not discharged even though a strike related Union policy of "following" customers who cross a picket line is an "aspect of a labor dispute which is arguably a protected activity under Section 7 . . . of the National Labor Relations Act (and) may not be directly regulated by state courts because of federal preemption" (citations omitted, court's opinion, paraphrased, page 39).

At page 40 of the court opinion the court states: "If they (the Union officers) questioned the permissibility of this practice, the proper course was a motion to modify the order, not reckless disobedience of its LITERAL (emphasis added) terms." Also *at page 40* of the court opinion the court states—: "While it is true that the court DID NOT SPECIFICALLY FORBID (emphasis added) following, it did forbid intimidation, harassment and coercion of customers." These two quotations, although seemingly contradictory, spell out the Union officers dilemma in this habeas corpus proceeding. The restraining order did NOT forbid the practice of following. Had it done so, the Union would have immediately moved to amend it as an invasion of their constitutional right to amplify picketing by peaceful persuasion of any strikebreaker, such as a customer of a struck Company who crosses a picket line to purchase product (See *Hendricks, N.L.R.B. v. Meatcutters Union*, 95 LRRM 2706 at 2711, May, 1977, N.J. D.C.). The first actual knowledge which the Union had of the Circuit Court Judge's concern regarding the practice of following came on June 3, 1976, when the Circuit Judge issued his Order to Show Cause and therein specifically warned the Union officers that further following would be "conducted at the peril of the defendants." (Tr. 627). This court's opinion references this event *at page 35* and highlights it in footnote No. 10.

A. The court's opinion overlooks and fails to comment on the most vital and critical part of the Union officers' defense in the contempt proceeding against them. *THERE IS NO EVIDENCE IN THE RECORD TO SHOW THAT ANY ONE CUSTOMER WAS FOLLOWED AS MUCH AS ONE INCH AFTER THE JUNE 3, 1976 WARNING BY THE CIRCUIT JUDGE. UNION EXECUTIVE OFFICER GIRARD SPECIFICALLY DENIED, ON JUNE 10, 1976, THAT ANY CUSTOMER WAS FOLLOWED AFTER JUNE 3, 1976.* (Tr. 868) *ANY ASSUMPTION ON THE PART OF THE SPECIAL PROSECUTOR, THE CIRCUIT JUDGE OR THIS COURT THAT ANY CUSTOMER WAS FOLLOWED AFTER THE CIRCUIT COURT WARNING ON JUNE 3, 1976* (Tr. 627), *IS PATENTLY ERRONEOUS* (Tr. 868).

B. The Union was compelled to camouflage its procedures regarding its following policy after the Circuit Court's warning on June 3, 1976. This was the actual advice of their counsel and this was the decision of the executive board. The camouflage was to announce a policy of "following" on a "random basis" (court's opinion, page 35, footnote 10), BUT, IN FACT, TO TERMINATE ALL FOLLOWING. This camouflage was deemed necessary to simultaneously protect the members and officers of the Union in view of the Circuit Judge's warning but, also, to attempt to protect the integrity of the Union's strike policies and tactics.

C. Thus, as soon as the Circuit Court advised the Union of its warning regarding "following", that activity immediately ceased.

D. The Circuit Court's finding of fact that the practice of following continued after June 3, 1976 (Tr. 1153, 1154, finding No. 13) and this court's assumption that this finding was correct (opinion, page 13) are not sup-

ported by a scintilla of fact or a shred of evidence. The petitioners urge a remand of this portion of this proceeding, pursuant to Rule 91.39[3] if there is an iota of doubt regarding the content of sub-paragraphs A, B, C or D, supra.

E. The court opinion states that "the members of the executive board were the deliberate instigators of acts of contempt and may be punished as such;" (page 40). The court's opinion further states— ". . . that * * * The executive board members, themselves, did not engage in following" (page 40) and ". . . the evidence did not support a finding that the leaders, themselves, had engaged in conduct directly violative of the literal terms of the restraining order . . ." (page 40) and "Finally, we conclude that the practice of following violated the terms of the restraining order" (page 40). This accumulation of quotations establishes that the Union officers are found to be guilty as the parties who directed and controlled the policy of following customers. The entire record in this habeas corpus proceeding reveals that only two (2) Union members committed a contemptuous act in the course of following on one (1) occasion. The convictions of the Union officers therefore must rise or fall on the basis of the convictions of their two (2) members in one (1) episode. Section 556.130 R.S.Mo. provides that "no agreement shall be deemed a conspiracy unless some overt act besides such agreement be done to effect the object thereof, by one or more of the parties to such an agreement." Paraphrasing that statute to the findings and circumstances herein dictates that the policy of following was a conspiracy contrived by the Union officers to

[3] Note to Petition for Certiorari to U. S. Supreme Court—:

Rule 91.39 of the Missouri Supreme Court Rules of Missouri Civil Procedure governs habeas corpus cases. Rule 91.39 allows evidence to be taken in a hearing if the habeas Court so determines.

harass, intimidate and coerce customers of the beer distributors. The entire record in the contempt proceeding reveals that hundreds, or perhaps thousands, of customers were followed in the course of the strike activity. Yet, after weeks of surveillance and photographing of Union members by the attorneys and investigators for the distributors, only one isolated episode of the following of a customer resulted in a contempt conviction. On the strength of that single episode six (6) Union officers are sentenced to serve between ten (10) to forty (40) days in confinement and the officers are fined in the cumulative amount of Thirty Thousand ($30,000.00) Dollars. The court opinion makes repeated reference to the fact that the Union officers expressly prohibited ". . . violence of every kind . . ." (page 35). Although the petitioners expressly deny the validity of the contempt finding against members Manion and Hosfeld in the episode involving the following of Grey Eagle customer Santoro, it must be presumed that if these two (2) union members are guilty, then, "the Union cannot be held responsible for acts which individuals, on their own, commit. The pickets acted outside their scope of authority and principles of agency preclude Union liability" (*Hendricks (N.L.R.B.) v. Meat Cutters Union*, supra, 95 LRRM, 2706 at 2711).

X. For the reasons set out thus far in this motion the petitioners move for a rehearing by this court and thereby a reconsideration of its opinion filed on August 30, 1977. Alternatively, and only in the event that this court does not grant the relief of discharging the petitioners for the reasons stated herein thus far, then, in that event, these petitioners move that this habeas corpus proceeding be transferred en banc to the St. Louis District of the Missouri Court of Appeals for the following reasons:

(a). Petitioners are prevented from moving for a transfer of this habeas corpus proceeding to the Missouri Supreme Court by reason of the procedural rules governing habeas corpus. In the event that these petitioners do not obtain appropriate relief from this court a separate proceeding for a Writ of Habeas Corpus will be instituted directly in the Missouri Supreme Court.

(b). Petitioners state that the issues involved in this proceeding are of such general interest and importance to all future striking Union members throughout the State of Missouri that the final decision herein should be made by this court en Banc. The issues of first impression herein regarding the questions of federal preemption, limited admissability of evidence, liability of Union officers and state labor relations policy will ultimately be governed by the final decision in this proceeding.

(c). Petitioners do not offer any separate suggestions in support of this motion inasmuch as the authorities relied upon are referenced in the body of the motion.

XI. Further, alternatively, and only in the event that these petitioners are not discharged or this cause is not transferred to this court en Banc, these petitioners move that this court specifically grant a stay of the implementation and execution of any further orders remanding these petitioners to the custody of the respondent, the Sheriff of the City of St. Louis, until such time as these petitioners can pursue their right to bring an application for separate and further Writs of Habeas Corpus to the Supreme Court of the State of Missouri for further consideration of the contempt convictions and commitments ordered by the Circuit Court of the City of St. Louis. Petitioners estimate that it would require a minimum of fifteen (15) additional days to prepare and file their application for Writs of Habeas Corpus in the Supreme Court of Missouri

after the entry of any final Order of this court denying them appropriate relief.

Petitioners further move, alternatively, that this court grant them permission to remove the original transcript filed in this proceeding for whatever purpose may be required in the Missouri Supreme Court.

WHEREFORE, the petitioners respectfully request this Court to grant them a rehearing in this case, or, in the alternative, to transfer this cause to the St. Louis District of the Missouri Court of Appeals en Banc or, in the alternative, to grant a stay of the remand of these petitioners to the custody of the Respondent, the Sheriff of the City of St. Louis, and for such other and further orders as this court deems appropriate.

/s/ JEROME J. DUFF
/s/ JAMES E. HECKEL
302 Missouri State Bank Building
1139 Olive Street
St. Louis, Missouri 63101
Attorneys for Petitioners

APPENDIX C

In the
Supreme Court of the United States

October Term 1978

No. A-295

John J. Girard; John E. Taylor; Eugene P. Grossman; Charles Kelting; Louis Feldhaus; Dudley Alsop; Ronald McKenzie; Wray Hambrick; Jerry Becht; Michael Manion; Ron Hosfeld;

Petitioners,

v.

Benjamin Goins, Sheriff of the City of St. Louis,

Respondent.

APPLICATION FOR STAY OF AN ORDER OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

TO THE HONORABLE HARRY A. BLACKMUN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Petitioners, John J. Girard; John E. Taylor; Eugene P. Grossman; Charles Kelting; Louis Feldhaus; Dudley Alsop; Ronald McKenzie; Wray Hambrick; Jerry Becht; Michael Manion; Ron Hosfeld, pray that an order be entered staying the commitment orders and judgments of the Circuit Court of the City of St.

Louis, Missouri in the case of Lohr Distributors, etc. v. Girard, et al., No. 59593-F entered on July 18, 1978, pending the filing of a petition for a writ of certiorari in this Court. In support of this application, petitioners respectfully state as follows:

Preface

This application arises out of a conviction, judgment and confinement of eleven Officers and members of Teamster Local No. 133 (Beer Drivers, etc., St. Louis, Missouri) for criminal contempt of the Circuit Court of the City of St. Louis, Missouri (Division No. 3, Hon. Carl Gaertner, Judge). The original eleven judgments of criminal contempt were entered by the state trial court on June 24, 1976. The law of Missouri does not allow any form of appeal from a judgment of criminal contempt of court. Your petitioners have been continuously involved in habeas corpus proceedings throughout the Missouri Appellate Courts, the U.S. District Court for the Eastern District of Missouri and the U.S. Court of Appeals for the Eighth Circuit since June 25, 1976. Habeas proceedings have been filed and determined in the following Courts:

1. Missouri Court of Appeals, St. Louis Division, reported as Girard, et al. v. Percich, 557 S.W.2d 25, (August, 1977);
2. Missouri Supreme Court, September through January, 1977, (Case Nos. 60393, etc., denied without opinion);
3. U.S. District Court, Eastern District of Missouri, January, 1978 (see item 4, following, for status);
4. U.S. Court of Appeals, Eighth Circuit, January, 1978, reported as Girard, et al. v. Goins, 575 F.2d 160, April, 1978;
5. On June 26, 1978 the U.S. District Court, Eastern Division of Missouri issued its further Order (applica-

tion exhibit No. 1, attached) implementing the mandate of the Eighth Circuit Court of Appeals (supra);

6. On July 18, 1978 the Circuit Court of the City of St. Louis amended its June 24, 1976 criminal contempt judgments and orders of commitment (reducing previously assessed fines);

   A. Your petitioners immediately initiated a second round of habeas proceedings in the Missouri Appellate Courts in response to these amendments, (Missouri Court of Appeals, order on July 19, 1978 denying, without hearing or opinion, petitions for writs of habeas corpus, attached as application exhibit No. 2, and the Missouri Supreme Court on September 12, 1978 order denying, without hearing or opinion, petitions for writs of habeas corpus, attached as application exhibit No. 3);

   B. On Friday, September 15, 1978, the Circuit Court of the City of St. Louis again amended its June 24, 1976 judgments and orders of commitment (eliminating your petitioners liabilities for payment of legal fees to the criminal contempt proceeding Special Prosecutor);

7. On Monday, September 25, 1978 the U.S. District Court, Eastern Division of Missouri issued its further judgment and memorandum opinion (attached and identified as application exhibit No. 4).

   A. The said September 25, 1978 memorandum opinion describes the July through September, 1978 activities of the Circuit Court of the City of St. Louis and the Missouri Appellate Courts;

   B. The said September 25, 1978 U.S. District Court judgment denied your petitioners' request for that Court's certificates of probable cause;

8. Your petitioners appealed from the said U.S. District Court judgment of September 25, 1978 the same day;

   A. A motion to stay the present jail confinement of petitioners Girard and Taylor was also simultaneously, immediately lodged with the Eighth Circuit Court of Appeals;

   B. Copies of the appeal, motion to stay and related correspondence to the said Eighth Circuit Court of Appeals filed by your petitioners and the Respondent Sheriff are attached, in package form, and identified as application exhibit No. 5.

9. Your petitioners suggest that it is unduly burdensome to copy and attach any additional exhibits as pleadings, Orders, etc. identified thus far in this preface inasmuch as these proceedings involve eleven (11) separate petitioners-appellants-defendants and the remaining unattached documents number approximately one thousand (1,000) separate pages, all of which are duly referenced and/or identified thus far in this Application;

   A. This application has been verified by Counsel for your petitioners to attest to the truth of its statements in furtherance of your petitioners' continuing efforts to obtain an expeditious and timely Order staying any further jail confinements until such time as your petitioners have had the opportunity to duly pursue their available legal remedies and have this litigation properly and finally adjudicated.

10. On Friday, September 29, 1978 the Eighth Circuit Court of Appeals entered its Orders denying a certificate of probable cause required to allow the

petitioners appeals to that Court and, further refusing to stay the continuing confinement of petitioners, Girard and Taylor. A copy of the said Orders is attached and identified as application exhibit No. 6.

Jurisdiction

The jurisdiction of this Court to determine this application for stay is predicated upon Rule 23, Federal Rules of Appellate Procedure and, in particular, sub-paragraph (d) thereof reciting that ". . . special reasons . . ." may be demonstrated to this Court or a Justice hereof respecting custody of a prisoner in a habeas proceeding (see *Jago v. U.S. District Court*, 570 F.2d 618 at 626, footnote No. 6, 1978, also, 28 U.S.C. 1257 (3) and 28 U.S.C. 2101 (f) and Rule 49 (3) of the Supreme Court Rules.

Statement of the Case

The petitioners have sought, in vain thus far, to be heard to assert their defenses to the actions of the Circuit Court of the City of St. Louis, in particular in its Orders of July 18, 1978 (amending its judgments by reducing the fines assessed against the petitioners in its original judgments finding guilt of criminal contempt on June 24, 1976) and of September 15, 1978 (again amending its judgments of June 24, 1976 by eliminating petitioners' liabilities for the awarded legal fees to its Special Prosecutor). Specifically, your petitioners contend that the state Circuit Court had lost all jurisdiction by July, 1978 to amend the judgments of criminal contempt imposed onto these petitioners on June 24, 1976 (two years previously). Alternatively, the petitioners contend that any assertion of jurisdiction by the said state Circuit Court two (2) years after the entry of its final judgments of criminal contempt is a direct

denial of the constitutional rights of your petitioners in the following particulars:

1. The fifth and fourteenth amendments to the United States Constitution guarantee the rights of due process of law and the equal protection of the law to these petitioners.

2. Both the civil rules and the criminal rules of procedure of Missouri declare that a trial court judgment is final on the thirty-first (31st) day after its entry (Missouri Criminal Rule 27.22, Civil Rules 75.01 and 81.05).

A. See also, *State ex rel. Parks v. Barker*, 567 SW 2d 130 (Mo.Ban. 1978) and Provisional Rule in Prohibition issued by the Missouri Supreme Court on September 12, 1978 in the case of Wagner v. Rudy, Judge (copy attached and identified as application exhibit No. 7 prohibiting a ". . . resentencing . . ." in a statutory criminal action, pending the further order of the Missouri Supreme Court.

3. Missouri law does not allow an appeal from a criminal contempt conviction and speaks to a criminal contempt proceeding as being "sui generis" (*Girard v. Percich*, supra, 557 S W2d 25 at 36).

4. By allowing the contempt trial Judge to re-sentence these contemnor-petitioners (twice, July 18, and September 15, 1978) more than two (2) years *AFTER* their original judgments and sentences were ordered (June 24, 1976) Missouri has denied any form of due process to these petitioners and further denied them the same protections against re-sentencing afforded a defendant in a Missouri statutory criminal prosecution.

A. Your petitioners fully understand that the state contempt trial court amendments to their judgments and sentences has substantially reduced their original

financial liabilities in the contempt proceedings (approximately $45,000.00 in fines and an additional estimated $10,000.00 in legal fees to the Special Prosecutor) however, there is no precedent in Missouri law which allows the criminal contempt judgment to be re-opened and amended, for any reason, whether it be to the benefit or the detriment of the convicted contemnor (see *Ex parte Miles*, 406 SW 2d 107 at 114, Mo. App. 1966; *In re Randolph*, 474 SW 2d 36 at 39, Mo. App. 1971; *Ex parte Neal*, 507 SW 2d 674 at 680, Mo. App. 1974; *Ex parte Huff*, 516 SW 2d 778 at 780, Mo. App. 1974).

5. ". . . for of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for the offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution.", *Frankel v. United States*, 131 F.2d 756 at 758 (6th Cir., 1942).

6. Throughout two (2) years of these proceedings your petitioners have filed five (5) separate habeas petitions. They have never been afforded an evidentiary hearing in any Court, state or federal, in order to allow them to develop a full record of their position in accord with the provisions of Rule 8 of the Rules Governing Section 2254 Cases (28 U.S.C. 2254). These petitioners have repeatedly and continuously denied that finding of guilt by criminal contempt was supported by evidence.

A. The bizarre, repeated amendments of the judgments and related sentences serves to further highlight the need to allow your petitioners the basic

due process of a proper evidentiary hearing to properly develop a full record and then have a proper adjudication of the evidence of alleged guilt of criminal contempt.

B. The April, 1978 decision of the Eighth Circuit Court of Appeals compelling a qualified constitutional right to a jury trial in a Missouri criminal contempt proceeding reversed 150 years of Missouri precedent. The failure and/or refusal of the Missouri appellate courts to speak to this topic in the second round of habeas proceedings (July to September, 1978) sets a star-chamber atmosphere which makes a mockery of the constitutional guarantees of due process and equal protection of the laws for your petitioners (and all future criminal contempt defendants in Missouri).

7. The Circuit Court of the City of St. Louis has repeatedly refused to grant a stay of its Orders of Commitment. The relief sought in this Court is the only forum to which your petitioners can appeal from the final orders of the state courts and the Eighth Circuit Court of Appeals.

Petitioners Meet All of the Prerequisites for the Grant of a Stay

1. Each of the eleven (11) petitioners have been confined from two (2) to four (4) days during 1976 and prior to July, 1978. Two (2) of the petitioners, Girard and Taylor are presently confined. Three (3) additional petitioners are ordered to be confined on various dates during October, 1978. The remaining six (6) petitioners have either completed their confined time or paid fines (under protest). All petitioners will refuse to pay any further fines or assessed court costs from the criminal contempt proceeding. This refusal to pay will subject them to possible further

confinement inasmuch as all admittedly have the financial means to make such payments. Thus, all eleven (11) petitioners remain qualified to continue to seek habeas relief.

2. The actual present confinement and jeopardy of later and/or further confinement subjects these petitioners to immediate and irreparable harm and injury if the stay of the state proceedings is not granted.

3. Your petitioners submit that any reasonable analysis of the extant case leads inexorably to the conclusion that they would, beyond a doubt, prevail on the merits of their position, at a minimum to the extent of their entitlement to an evidentiary hearing to properly develop a record of their position of the lack of evidence of guilt of criminal contempt and the related constitutional defenses described herein.

4. Petitioners state that a summary disposition of this application would justify an Order of stay of the state court proceeding coupled with an Order to the United States District Court for the Eastern District of Missouri, Eastern Division (Honorable James H. Meredith, Chief Judge) to immediately undertake to grant petitioners an evidentiary hearing as described by Rule 8, Rules Governing Section 2254 Cases; 28 U.S.C. 2254. This type of summary disposition would eliminate any further burden on this Court via certiorari. Alternatively, your petitioners will proceed to apply to this Court for a Writ of Certiorari in due course.

A. This application has been prepared in behalf of your petitioners and brought to this Court for filing from St. Louis, Missouri within approximately forty-eight (48) hours of the time of their receipt of the final Orders of the Eighth Circuit Court of Appeals (Friday, September 29, 1978 at 4:45 P.M.) denying them a stay or the right of appeal. Time is obviously of the utmost concern to these litigation-weary petitioners to

be relieved of their present and impending jail confinements until their cause is properly adjudicated.

WHEREFORE, petitioners pray this Court to grant an immediate stay Order to the Circuit Court of the City of St. Louis, Missouri, (Honorable Carl R. Gaertner, Chief Judge) to suspend any further proceedings in Cause No. 59593-F and to further order the respondent herein, Benjamin Goins, Sheriff of the City of St. Louis to release petitioners Girard and Taylor from their present confinement in the Medium Security Institution of the City of St. Louis and for such other and further Orders as this Court deems appropriate.

Respectfully submitted,

/s/ JEROME J. DUFF
1139 Olive Street, Suite 302
St. Louis, Missouri 63101
(314) 621-3833
Attorney for Petitioners

State of Missouri }
City of St. Louis } ss.

Jerome J. Duff, Attorney, Member of the Bar of Missouri and admitted to the Bar of the Supreme Court of the United States on October 7, 1963, on his oath deposes and states that he has drafted the foregoing application and that the statements therein are true and correct to the best of his knowledge and belief and that the application exhibits attached thereto are accurate reproductions of the described documents.

/s/ JEROME J. DUFF

Subscribed and sworn to before me this 30th day of September, 1978.

/s/ MARY R. MONTEROSSO
Notary Public

My Commission Expires:
January 28th, 1980.

EXHIBIT 1

United States District Court
Eastern District of Missouri
Eastern Division

John J. Girard, John E. Taylor, Eugene P. Grossman, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop, Ronald McKenzie, Wray Hambrick, Jerry Becht, Michael Manion, Ron Hosfeld,
Petitioners,
vs.
Benjamin Goins, Sheriff of the City of St. Louis,
Respondent.

Cases Nos. 78-30 C (1) through 78-40 C (1)

ORDER

In accordance with the Judgment of the United States Court of Appeals for the Eighth Circuit filed with this Court on June 14, 1978,

IT IS HEREBY ORDERED that unless the Circuit Court of the City of St. Louis either reduces the fines heretofore assessed against the Petitioners herein to an amount not exceeding $500.00 for each offense for which such respective Petitioner has been convicted, or provides the Petitioners herein with an opportunity for a new trial with a jury within ninety (90) days from the date hereof, or within such additional time as may be directed by further order of this Court, writs of habeas corpus will be at the expiration of said time granted, and Petitioners will be released from confinement.

IT IS FURTHER ORDERED that counsel for Petitioners and the Special Prosecutor appointed by the Circuit Court of the City of St. Louis shall keep this Court advised as to the proceedings in the Circuit Court of the City of St. Louis and shall report in writing to this Court prior to the expiration of ninety (90) days from the date hereof.

IT IS FURTHER ORDERED that the bonds of Petitioners heretofore posted with the United States Court of Appeals for the Eighth Circuit by the terms of which Petitioners are to abide by all orders of said Court and by all orders of this Court remain in effect in accordance with the terms thereof.

IT IS FURTHER ORDERED that Petitioners and each of them are directed to appear before the Circuit Court of the City of St. Louis for the purpose of proceedings consistent with this order on such dates as may be directed by order of the Circuit Court of the City of St. Louis, State of Missouri directed to said Petitioners and served upon them.

Order entered this 26 day of June, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

EXHIBIT 2

Missouri Court of Appeals
St. Louis District
St. Louis County Division
Courts Building Clayton, Mo. 63105

Office of the Deputy Clerk
Area Code 314
889-3297

July 19, 1978

Mr. Jerome J. Duff
Attorney at Law
1139 Olive Street (302)
St. Louis, MO 63101
Mr. John Emde
Attorney at Law
611 Olive Street
St. Louis, MO 63101

RE: Nos. 40706 thru 40716 State ex rel. Ronald McKenzie, et al., Pets., vs. Benjamin J. Goins, Sheriff, etc., Resp.

Gentlemen:

The Court has today made the following ruling:
Petition for Writ of Habeas Corpus denied.

Sincerely,

Robert D. St. Vrain
Clerk
By: (Illegible)
Deputy Clerk

EXHIBIT 3

No. 60874-60884

In the Supreme Court of Missouri

September Session, 1978

State ex rel. John J. Girard, et al.,

Petitioners

vs. HABEAS CORPUS

Benjamin Goins, Sheriff of the City of St. Louis,

Respondent

Now at this day, on consideration of the petition for a writ of Habeas Corpus herein to the said respondent ....., it is ordered by the court here that the said petition be, and the same is hereby denied.

Simeone, J. not participating

STATE OF MISSOURI—SCT.

I, THOMAS E. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1978, and on the 12th day of September, 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 12th day of September, 1978.

Thomas F. Simon
Clerk
By Jan Gallamore
D. C.

EXHIBIT 4

United States District Court
Eastern District of Missouri
Eastern Division

John J. Girard, John E. Taylor, Eugene P. Grossman, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop, Ronald McKenzie, Wray Hambrick, Jerry Becht, Michael Mannion, Ron Hosfeld, Petitioners, vs. Benjamin Goins, Sheriff of the City of St. Louis, Respondent.	Cases Nos. 78-30 C (1) through 78-40 C (1)

JUDGMENT

A memorandum dated this day is hereby incorporated in and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petitions for habeas corpus of Wray Hambrick, Jerry Becht, Michael Mannion and Ron Hosfeld are dismissed for the reason they have paid their fines and are not being held in confinement.

IT IS FURTHER ORDERED that the petitions of John J. Girard, John E. Taylor, Eugene P. Grossman, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop and Ronald McKenzie are dismissed for the reasons set out in the accompanying memorandum.

IT IS FURTHER ORDERED that the motion to stay reporting to the city jail on September 18, 1978, be and the same is hereby denied.

IT IS FURTHER ORDERED that the petitioners' request for certificates of probable cause be and the same is denied.

Dated this 25th day of September, 1978.

/s/ James H. Meredith
United States District Judge

MEMORANDUM

This matter is pending on application of some of the petitioners for writ of habeas corpus and for a stay of the order of the Circuit Judge ordering them to report to the Sheriff of St. Louis City to begin serving sentences heretofore imposed.

The history of this case shows that petitioners were all members and officers of Brewery Drivers and Helpers Local Union No. 133 of St. Louis, and as a result of their activities in April of 1976, were found guilty of criminal contempt on June 24, 1976, by the Circuit Court of the City of St. Louis. The Court imposed the following sentences and fines:

	Confinement	Fine
John J. Girard	40 days	$10,000
John E. Taylor	40 days	$10,000
Eugene P. Grossman	10 days	$ 2,500
Charles E. Kelting	10 days	$ 2,500
Louis H. Feldhaus	10 days	$ 2,500
Dudley Alsop	10 days	$ 2,500
Ronald McKenzie	30 days	$ 5,000
Wray Hambrick	———	$ 2,500
Jerry Becht	———	$ 2,500
Michael Manion	———	$ 5,000
Ron Hosfeld	———	$ 2,500

Thereafter petitioners sought and were denied habeas corpus relief in the Missouri Court of Appeals, the Supreme Court of Missouri and the United States District Court for the Eastern District of Missouri. The District Court of the Eastern District of Missouri denied relief in an order on January 11, 1978. On appeal to the United States Court of Appeals for the Eighth Circuit, that court held that a sentence of 40 days was not enough to require a jury trial, but coupled with the fines, the Court stated that a fine in excess of $500 may not be imposed without trial. The Court remanded to the District Court with instructions that the Circuit Court of the City of St. Louis either reduce the fines or provide the petitioners with a jury trial. Pursuant to that opinion filed on April 13, 1978, this Court on June 26, 1978, ordered that unless the Circuit Court of the City of St. Louis reduce the fines against the petitioners to an amount not exceeding $500, that a writ of habeas corpus would be issued within 90 days.

On July 18, 1978, the Circuit Court of the City of St. Louis reduced the fine against each petitioner to the sum of $500. That Court further provided that the failure to pay fines, costs and attorney fees shall not be grounds for any additional confinement of any petitioner, pending further action of that Court.

Each petitioner filed a writ of habeas corpus in the St. Louis Court of Appeals raising as a ground for habeas corpus the fact that attorney fees to be later assessed constituted an additional fine and raising the grounds that the Circuit Court of the City of St. Louis was without authority to amend its original order of June 24, 1976, since more than 31 days had lapsed since the day the judgment had become final. The St. Louis Court of Appeals for the State of Missouri denied a writ of habeas corpus. Writs were then filed by each petitioner with the Supreme Court of the State of Missouri raising the same grounds that had been raised in the St. Louis Court of Appeals. These writs were denied.

On September 14, 1978, the petitioners filed a motion to stay their confinement and the request for the issuance of an additional writ of habeas corpus on the grounds that the attorneys fees which may be awarded by the Circuit Court of the City of St. Louis amounted to a fine in excess of $500. In a conference with attorneys for the petitioners and respondent, the respondent agreed to respond on September 15, 1978.

Up to this point none of the petitioners had spent any time in jail. Through the successful efforts of their attorney they had avoided any jail sentence which had been imposed on June 24, 1976. On September 15, 1978, the Special Prosecutor appointed by the Circuit Court of the City of St. Louis waived his right to any attorney fees and the Circuit Court ordered that none would be assessed. Petitioners' attorney then requested this Court to file an amended motion.

The amended motion was filed on September 18, 1978, raising as the sole grounds that the Circuit Court had no authority to reduce the fines as was done on July 18, 1978, pursuant to the opinion of the United States Court of Appeals for the Eighth Circuit and eliminated the attorney fees which was done on September 15, 1978. A response was filed by the respondent on September 19, 1978, and the parties stipulated as to the records of the previous proceedings in all of the Courts. The attorney for the petitioner advised the Court by letter that petitioners Wray Hambrick, Jerry Becht, Michael Mannion and Ron Hosfeld had paid their fines of $500 and had been discharged.

The Circuit Court of the City of St. Louis ordered petitioners John J. Girard, John E. Taylor, Louis H. Feldhaus and Dudley Alsop to report to the sheriff at 10:00 o'clock on September 18, 1978, to begin serving their sentences. The Circuit Court of the City of St. Louis has deferred such an order as to petitioners Eugene P. Grossman, Charles E. Kelting and Ronald McKenzie in order that the union may continue to

carry out its business in an orderly manner. These petitioners will report after the other petitioners have served their sentences.

This Court is of the opinion that all of the requirements set out in the opinion of the United States Court of Appeals for the Eighth Circuit have been met by the State of Missouri.

The effect of the present motion before this Court is to challenge the authority of the United States Court of Appeals for the Eighth Circuit; that they have no legal right to issue such an order and that the Circuit Court of the City of St. Louis has no right to respond to that order. This has been laid to rest by the Supreme Court of the United States in the case of *Taylor v. Hayes,* 418 U.S. 488 (1974), in which the Court stated that a State has a right to reduce a sentence to less than six months and thereby to obviate a jury trial. Accordingly, this Court will order the petitions of each of the petitioners be dismissed.

Dated this 25th day of September, 1978.

/s/ J. H. MEREDITH
United States District Judge

EXHIBIT 5

United States District Court
Eastern District of Missouri
Eastern Division

John Girard, John E. Taylor, Eugene P. Grossmann, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop, Ronald McKenzie, Wray Hambrick, Jerry Becht, Michael Manion, Ron Hosfeld, Petitioners, vs. Benjamin Goins, Sheriff of The City of St. Louis, Respondent.	Case Nos. 78-30-C (1) Through 78-40-C (1).

NOTICE OF APPEAL

Notice is hereby given that each of the above named Petitioners hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying their motions for the issuance of Writs of Habeas Corpus entered in this action on the 25th day of September, 1978.

/s/ JEROME J. DUFF
/s/ JAMES E. HECKEL

United States Court of Appeals for the Eighth Circuit

John J. Girard, and John E. Taylor, Petitioners, v. Benjamin Goins, Sheriff of The City of St. Louis, Respondent.	}	No. 78-1043

PETITIONERS' MOTION TO STAY

Come now Petitioners JOHN J. GIRARD and JOHN E. TAYLOR, and respectfully move this Court for its Order to stay any further confinement imposed upon them by the Circuit Court of the City of St. Louis, State of Missouri, for the following reasons:

1. The Mandate and Judgment of this Court has been implemented by the further Order of the U. S. District Court for the Eastern District of Missouri entered on September 25, 1978, (attached).

2. Petitioners have filed their appeal in the U. S. District Court to this Court to review the denial of their petitions for issuance of Writs of Habeas Corpus.

3. Petitioners Grossmann, Kelting and McKenzie are not confined at this time by reason of a stay order issued by the Circuit Court of the City of St. Louis.

4. Petitioners Girard and Taylor are prepared, if necessary, to renew their surety bond as previously approved by this Court.

5. Petitioners Girard and Taylor respectfully state that their confinement should be stayed until their claims have been adjudicated by this Court.

WHEREFORE, the petitioners, JOHN J. GIRARD and JOHN E. TAYLOR, pray that this Court issue its Orders to Stay their confinement as set out herein and for such other and further Orders as this Court deems appropriate.

/s/ JEROME J. DUFF
/s/ JAMES E. HECKEL
Attorneys for Petitioners
1139 Olive Street, Suite 302
St. Louis, Missouri 63101
(314) 621-3833

EXHIBIT 6

United States Court of Appeals for the Eighth Circuit

No. 78-1700 September Term, 1978

John J. Girard and John E. Taylor, Appellants, v. Benjamin Goins, Sheriff of the City of St. Louis, Appellee.	}	Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

On consideration of various matters now pending in this cause it is hereby ordered:

1. Application for certificate of probable cause to appeal is denied.

2. Appellants' motion for stay pending appeal is denied.

September 29, 1978

EXHIBIT 7

In the Supreme Court of Missouri
En Banc

State ex rel. Melvin Wagner, Relator,

vs. Provisional Rule in Prohibition No. 60949

Honorable James Ruddy, Judge, Circuit Court, St. Louis County, Division 14, Respondent.

The State of Missouri to Honorable James Ruddy, Judge, Circuit Court of St. Louis County,

GREETING:

WHEREAS, it has been represented to the Supreme Court of Missouri on the part of relator Melvin Wagner, as indicated and set forth in a certain petition for writ of prohibition herein, a copy of which is hereto attached and made a part hereof; and we being willing to maintain the rights of the State of Missouri and the law and customs thereof;

NOW, THEREFORE, you the said James Ruddy, Judge, Circuit Court of St. Louis County, are COMMANDED to be and appear before the Supreme Court of Missouri, en Banc, on or before October 12, 1978, and show cause, if any you have,

why a writ of prohibition should not issue, prohibiting you from resentencing petitioner in the cause entitled State of Missouri, plaintiff vs. Melvin Wagner, defendant, No. 396587, now pending before you in the Circuit Court of St. Louis County until the further order of this Court.

Herein fail not at your peril.

WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 12th day of October, 1978.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

Supreme Court, U. S.
FILED
JAN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1046

JOHN J. GIRARD, et al.,
Petitioners,

v.

GORDON D. SCHWEITZER, Sheriff of the City of St. Louis,
Successor to BENJAMIN GOINS,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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December . ., 1978

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

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JOHN J. GIRARD, et al.,
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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

This order was issued by the Eighth Circuit Court of Appeals on December 29, 1978, amending, for clarification, its orders of September 29, 1978 (A-39, 40) denying probable cause for appeal to each of the eleven (11) petitioners for certiorari herein.

United States Court of Appeals
For the Eighth Circuit

No. 78-1700 September Term, 1978

John J. Girard, John E. Taylor, Appellants,
and
Eugene P. Grossmann, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop, Ronald McKenzie, Wray Hambrick, Jerry Becht, Michael Manion, and Ron Hosfeld, Appellants,
vs.
Benjamin Goins, Sheriff of the City of St. Louis, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

The order entered by this Court on September 29, 1978 is hereby amended to reflect the correct caption of the case in this Court as it is now shown in this order.

December 29, 1978

A true copy.

Attest: Robert C. Tucker

Clerk, U.S. Court of Appeals, Eighth Circuit

Girard et al. v. Goins, Sheriff.

Now reported as:

575 F(2) 160 (8th Cir., 1978)

The page references in the petition for certiorari are to 575 F(2).

United States Court of Appeals
For the Eighth Circuit

No. 78-1043

John Girard, John E. Taylor, Eugene P. Grossman, Charles E. Kelting, Louis H. Feldhaus, Dudley Alsop, Ronald McKenzie, Wray Hambrick, Jerry Becht, Michael Manion and Ron Hosfeld,

Appellants,

v.

Benjamin Goins, Sheriff of The City of St. Louis,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 15, 1978

Filed: April 13, 1978

Before HEANEY, STEPHENSON and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

The eleven petitioners[1] appeal from the District Court's denial of habeas corpus relief under 28 U.S.C. §2254 from fines and sentences imposed upon their conviction for criminal contempt

[1] The petitioners filed separate petitions in the District Court, but subsequently requested that the cases be consolidated. This Court ordered the cases to be consolidated on appeal.

by the Circuit Court of St. Louis. Their principal contention is that the failure of the Circuit Court to offer them a jury trial violated their constitutional right to a jury trial. They also contend that the record is void of evidence to support their convictions and that the Circuit Court's orders of commitment and judgment are fatally defective. We reverse and remand for further proceedings consistent with this opinion.

The petitioners are all members or officers of the Brewery Drivers and Helpers Local Union No. 133 of St. Louis.[2] The incidents forming the basis for the convictions occurred during the course of a long strike by the local union against the wholesale beer distributors in the St. Louis metropolitan area and are described in detail in *State ex rel. Girard v. Perpich*, 557 S.W.2d 25 (Mo. Ct. App. 1977). During the course of the strike, the Circuit Court[3] issued orders restraining members of the local union from harassing, intimidating, frightening and interfering with customers of the beer distributors. The orders were issued on April 22 and 28, 1976. On May 28, the beer distributors filed a motion for the issuance of contempt citations for violations of the restraining orders. The Circuit Court held a preliminary hearing from June 1 to 3, and found probable cause to issue contempt citations. Each of the petitioners[4] was served with a notice of prosecution and was ordered to appear on June 10 to show cause why they should

[2] The local union is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] The Circuit Court acted in response to a petition filed by Lohr Distributing Company, Inc., which was the exclusive distributor for Anheuser-Busch products within the City of St. Louis. The petition was subsequently amended to include claims by Grey Eagle Distributors, Inc., the exclusive Anheuser-Busch distributor for St. Louis County.

[4] Ten individuals, other than petitioners, were also served with notices of prosecution for contempt. Nine were acquitted by the Circuit Court. The tenth was convicted but was discharged by Missouri Court of Appeals. *State ex rel. Girard v. Perpich*, 557 S.W.2d 25, 40 (Mo. Ct. App. 1977).

not be held in contempt of court. The attorney for the beer distributors was appointed special prosecutor and further testimony was taken at the June 10 hearing. The parties stipulated that evidence presented at the preliminary hearing be admitted for the consideration of the Circuit Court. On June 24, the Circuit Court found the petitioners guilty of criminal contempt and imposed the following sentences and fines:

	Confinement	*Fine*
John J. Girard	40 days	$10,000
John E. Taylor	40 days	$10,000
Eugene P. Grossman	10 days	$ 2,500
Charles E. Kelting	10 days	$ 2,500
Louis H. Feldhaus	10 days	$ 2,500
Dudley Alsop	10 days	$ 2,500
Ronald McKenzie	30 days	$ 5,000[5]
Wray Hambrick	—	$ 2,500
Jerry Becht	—	$ 2,500
Michael Manion	—	$ 5,000[6]
Ron Hosfeld	—	$ 2,500

None of the petitioners has as yet been confined or paid their fines. In a hearing before the Circuit Court on December 28, the petitioners stipulated that the local union had agreed to pay their fines.

The petitioners sought, and were denied, habeas corpus relief in the Missouri Court of Appeals. *State ex rel. Girard v. Perpich, supra.* They then sought habeas corpus relief from the

[5] Both Ronald McKenzie and Michael Manion were convicted of violations of more than one of the paragraphs of the restraining order. McKenzie received a sentence of thirty days and a fine of $2,500 for one violation and a fine of $2,500 for another. Manion received two $2,500 fines.

[6] *See* n.5, *supra.*

Missouri Supreme Court which denied relief for the reasons stated by the Court of Appeals "plus the fact that the additional allegations in the petition[s] filed in this court state no basis on which petitioner[s are] entitled to relief[.]" *State ex rel. Girard et al. v. Benjamin Goins, Sheriff*, Nos. 60393 through 60403 (Mo., filed December 19, 1977). The petitioners finally brought this action in federal district court for the Eastern District of Missouri seeking relief under 28 U.S.C. §2254. The District Court denied relief in an order on January 11, 1978.

I

We consider whether the petitioners had a constitutional right to a jury trial in light of the severity of the fines and sentences imposed upon them for their conviction for criminal contempt. Before we reach the merits of this issue, however, we must initially determine whether they waived any right to a jury trial that they might have and whether they exhausted their state remedies.

The District Court held that the petitioners had waived their right to a jury trial because they agreed that the Circuit Court could consider testimony from the preliminary hearing in determining whether or not they were guilty of criminal contempt. It also noted that the petitioners did not request a jury trial. We cannot agree that the petitioners waived their constitutional right to a jury trial. Both the Missouri and the Federal Rules of Criminal Procedure provide that the right to a jury trial persists until it has been appropriately waived. Fed.R.Crim.P. 23(a); Mo.R.Crim.P. 26.01(a). In order for such an important constitutional right to be waived "there must be an express, positive waiver—as distinguished from mere failure to request a jury." *Douglass v. First Nat. Rlty. Corp.*, 543 F.2d 894, 900 n. 37 (D.C. Cir. 1976). We have carefully reviewed the record, paying particular attention to the agreement that the Circuit

Court could consider the evidence given at the preliminary hearing and find nothing indicating that the petitioners expressly waived their right to a jury trial. The petitioners were not offered a jury trial—they merely acquiesced in non-jury proceedings.[7] Such acquiescence does not amount to an express waiver of the right to a jury trial, *see Douglas v. First Nat. Rlty. Corp., supra* at 899-900 n.37, 902, particularly when none of the petitioners were aware that the Circuit Court contemplated imposing fines and sentences as severe as those imposed here.

We next must consider whether the petitioners exhausted their state remedies with respect to their right to a jury trial. The petitioners first made a claim with respect to the denial of a jury trial when they contended, in their motion for a new trial, that their punishment was cruel and unusual because they had been denied a jury trial. The issue was next raised by four of the petitioners in their petitions for writs of habeas corpus in the Missouri Court of Appeals.[8] However, the issue was not pursued in briefs or oral argument before the Court of Appeals, and that

---

[7] We recognize the difficulty in administering the rule that contemnors are entitled to a jury trial in cases of serious criminal contempt. The rule requires the trial court to make a preliminary pretrial assessment of the matter in order to determine whether or not to proffer a jury trial. *See Douglass v. First Nat. Rlty. Corp.*, 543 F.2d 894, 903 (D.C. Cir. 1976). The obvious answer to the problem is to proffer a jury trial in those cases in which it appears that circumstances may require imprisonment for more than six months or the imposition of a fine of such magnitude to constitute a serious offense.

[8] Under Missouri law, the petition for a writ of habeas corpus is merely a preliminary document and the issues raised are determined by reference to the return and the traverse. *See Ryan v. Wyrick*, 518 S.W.2d 89, 91 (Mo. Ct. App. 1974); *Curtis v. Tozer*, 374 S.W. 2d 557, 567 (Mo. Ct. App. 1964); Wolff and Passante, *Habeas Corpus*, 24 ST. LOUIS B. J., No. 3, 36, 37 (1978). Thus, the appellee contends that the right to a jury trial issue was not properly raised by the petitioners in the Missouri Court of Appeals. We need not reach this question since it is clear that the issue was properly raised in the Missouri Supreme Court.

Court did not mention the issue in its opinion. Each of the petitioners raised the issue in their petitions for writs of habeas corpus in the Missouri Supreme Court. The special prosecutor devoted four of fifteen pages in his responsive brief to arguments answering the petitioners' contentions on this issue. The Missouri Supreme Court did not specifically address the issue. It denied the writs on the basis of the opinion of the Missouri Court of Appeals. However, it also stated that petitioners were not entitled to relief on any of the additional issues raised before it. The United States Supreme Court has recently stated that:

> It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief.

Smith v. Digmon, 98 S.Ct. 597, 599 (1978).

In light of *Smith v. Digmon, supra*, and under the circumstances of this case, we hold that the petitioners have exhausted their state remedies with respect to their constitutional claim of a right to a jury trial.

Since we have held that the petitioners did not waive their right to a jury trial and have exhausted their state remedies, we consider the merits of the petitioners' constitutional claim. Historically, both the state and federal courts have exercised the power to punish criminal contempt without a jury trial. *See generally Bloom v. Illinois*, 391 U.S. 194 (1968); Note, *Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors*, 1967 DUKE L. J. 632; Annot., *Supreme Court's Views as to Right to Trial by Jury in Contempt Proceedings*, 45 L.Ed.2d 815 (1974) (hereinafter cited as Annot.). However, in 1966, the Supreme

Court recognized the right to a jury trial in serious federal criminal contempt cases. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). After the Supreme Court held, in 1968, that the Sixth Amendment right to a jury trial was binding on the states, *Duncan v. Louisiana*, 391 U.S. 145 (1968), it then held that the right to a jury trial extended to serious state criminal contempts. *Bloom v. Illinois, supra*. Thus, the petitioners are only entitled to a jury trial if the criminal contempt was a "serious" as opposed to a "petty" offense.

The "exact location of the line between petty offenses and serious crimes" has not been clearly established. *Duncan v. Louisiana, supra* at 161. The seriousness or pettiness of an offense is usually determined by reference to the punishment authorized by the statute. *See* Annot., *supra* at 819. The Supreme Court has held that "when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense." *Bloom v. Illinois, supra* at 211. By analogy, the Supreme Court has looked to the definition of petty offenses under 18 U.S.C. § 1(3) which provides that a petty offense is one "the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." While the Supreme Court has stressed that the definition should not be accorded "talismanic significance," *Muniz v. Hoffman*, 422 U.S. 454, 477 (1974), it has held that imprisonment of a contemnor for longer than six months without also granting an opportunity for a jury trial is constitutionally impermissible. *See Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Frank v. United States*, 395 U.S. 147 (1969). It has held, however, that it "cannot accept the proposition that a contempt must be considered a serious crime under all circumstances where the punishment is a fine of more than $500, unaccompanied by imprisonment. • • • From the standpoint of determining the seriousness of the

risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different." *Muniz v. Hoffman, supra* at 477. Applying this rationale, the Supreme Court held in *Muniz v. Hoffman, supra,* that while a criminal contempt fine of $10,000 assessed against a large local union was not insubstantial, it was not of such magnitude to trigger a right to a jury trial.

In this case, the penalties imposed ranged from a fine of $10,000 and a sentence of forty days, to a fine of $2,500 and no sentence. The sentences imposed are not alone enough to require that an opportunity for a jury trial be offered to the contemnors. Thus, we must apply the *Muniz* standard of the "seriousness of the risk and the extent of the possible deprivation." *Id.* In this case, unlike *Muniz,* the fines were assessed against the individual contemnors. The fact that the local union later agreed to pay the fines is not relevant as the trial court had already imposed the fines and thus made its determination of the seriousness of the offense. *Cf. United States v. Hamdan,* 552 F.2d 276, 279 (9th Cir. 1977); *Douglass v. First Nat. Rlty. Corp., supra* at 902-903. Moreover, the primary responsibility for the payment of the fines remains with the individual petitioners as the commitment by the local union to pay the fines may be subject to challenge.[9]

In cases since *Muniz,* two circuits have noted that the potential impact of a large fine is immensely greater where the contemnor is an individual. *United States v. Hamdan, supra* at 280; *Douglass v. First Nat. Rlty. Corp., supra* at 902. In *Douglass v. First Nat. Rlty. Corp., supra,* the District of Columbia Circuit held that a $5,000 fine could not be assessed against an individual in a non-jury criminal contempt proceeding. In *United States v. Hamdan, supra,* the Ninth Circuit held that a defendant found guilty of an offense punishable by a possible $1,000 fine or up to six-months imprisonment was entitled to a jury trial. Both the circuits have indicated that until further guidance is received from the Supreme Court, "they feel that it is not unrealistic to treat any fine in excess of $500 as a serious matter to all individuals." *United States v. Hamdan, supra* at 280; *Douglass v. First Nat. Rlty. Corp., supra* at 902. While we are unwilling to establish the principle in this Circuit that any fine assessed against an individual in excess of $500 is of such magnitude to constitute a serious offense, we have no difficulty in holding on the basis of this record that fines ranging from $2,500 to $10,000 assessed against the individual petitioners do indeed constitute a serious offense.

[9] The opinion of the Missouri Court of Appeals states that the local union agreed to pay the petitioners' fines for them. *State ex rel. Girard v. Perpich, supra* at 35 n.11. However, neither the Missouri Court of Appeals opinion nor the record before this Court reveals whether the commitment was made by union officers, the union executive committee or by a vote of the full local union membership.

For this reason, we are of the view that the failure of the Circuit Court to affirmatively offer the petitioners a jury trial was a violation of their constitutional right in light of the severity of the fines and sentences imposed for criminal contempt. Since this is a state case, we do not have authority to revise the sentence ourselves as we would in a federal case. *See Cheff v. Schnackenberg, supra* at 380; *Douglass v. First Nat. Rlty. Corp., supra* at 903. However, if the state court reduces the fines to a non-serious level, then a jury trial would not be required. *See Taylor v. Hayes,* 418 U.S. 488, 496 (1974). We, therefore, remand the case to the District Court with directions to it to issue the requested writs of habeas corpus unless the Circuit Court of the City of St. Louis either reduces the fines to the level of a non-serious offense or provides the petitioners with an opportunity for a new trial with a jury within a reasonable time.

II

The petitioners next contend that the record is void of evidence to support their criminal contempt convictions. Federal

habeas relief under 28 U.S.C. §2254 is only available to the ground of insufficiency of the evidence if there is a total lack of evidence to sustain the state conviction. *White v. Wyrick*, 530 F.2d 818, 819 (8th Cir. 1976); *Cunha v. Brewer*, 511 F.2d 894, 898 (8th Cir.), *cert. denied*, 423 U.S. 857 (1975). We cannot agree that there is a total lack of evidence to support the petitioners' criminal contempt convictions. *See State ex rel. Girard v. Perpich, supra.* Since there is at least some credible evidence on the record supporting each of the petitioners' convictions, their petitions for relief on this ground must be denied.

III

The petitioners' final contention is that the Circuit Court's orders of commitment and judgment are fatally defective and are, therefore, unenforceable and void. The orders of commitment require the petitioners to pay court costs and reasonable attorney's fees to be assessed by the court. Since the court has not yet fixed costs and attorney's fees,[10] the petitioners contend that the orders improperly subject them to an indefinite confinement. They also contend that Missouri law forbids any award of attorney's fees to a special prosecutor in a criminal contempt proceeding.

This contention has not been raised by the petitioners in any of the proceedings in state courts. It was first raised in the District Court. The petitioners contend that the order of commitment cannot be clarified or changed by the state courts. However, as the District Court noted, Mo.R.Crim.P. 27.26 "specifically provides for motions to vacate or correct an unlawful or unconstitutional sentence." The parties have not filed a Rule 27.26 motion, nor have they otherwise presented this issue to

[10] We note that the record of a hearing held in the Circuit Court on December 28, 1976, reflects an understanding among the parties that the assessment of costs and attorney's fees would be held in abeyance pending appeal.

state courts. Under 28 U.S.C. §2254(b) and (c), all available state remedies must be exhausted before a writ of habeas corpus may issue. *See, e.g., Bonner v. Wyrick*, 563 F.2d 1293 (8th Cir. 1977); *Tyler v. Swenson*, 527 F.2d 877 (8th Cir.), *cert. denied*, 425 U.S. 915 (1976). Accordingly, this issue cannot be raised at this time since the petitioners have failed to exhaust their state remedies.

Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1046

JOHN J. GIRARD, et al.,
Petitioners,

v.

GORDON D. SCHWEITZER, Sheriff of the City of St. Louis,
Successor to Benjamin Goins,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Questions Presented	5
Reasons for Not Granting the Writ	6
Conclusion	8

Table of Authorities

Cases

Butts v. Wainwright, 575 F. 2d 576 (5th Cir. 1978)	7
Mapp v. Warden, New State Correctional Institution for Women, 531 F. 2d 1167 (2nd Cir. 1976)	7
Rose v. Hodges, 423 U.S. 19 (1975)	7
State ex rel. Girard, et al. v. Percich, 557 S.W. 2d 25 (Mo. App. 1977)	2
Taylor v. Hayes, 418 U.S. 488 (1974)	5, 7
White v. Wyrick, 530 F. 2d 818 (8th Cir. 1976)	7

Statutes

Title 28 U. S. Code §2254	6, 7

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

STATEMENT OF THE CASE

The statement of the case contained in the petition for a Writ of Certiorari does not include all that is material to the consideration of the question presented in this cause. Rather than supplement each and every omission in the petitioners' statement of the case, and in an effort to present this Court with a clear and accurate statement of all that is material to the consideration of the question presented, respondent shall set forth his own concise statement of the case.

The history of this case indicates that petitioners, all members or officers of Brewery Drivers and Helpers Local Union No. 133 of St. Louis, affiliated with the International Brotherhood of Teamsters, etc., were found guilty of criminal contempt of Court by the Circuit Court of the City of St. Louis, State of Missouri, on June 24, 1976. The convictions were fully reviewed by the Missouri Court of Appeals, St. Louis District, by means of Preliminary Writs of Habeas Corpus and the convictions affirmed by opinion of that Court filed on August 30, 1977, found reported as *State ex rel. Girard, et al., Petitioners, v. Raymond T. Percich, Sheriff of the City of St. Louis, Respondent*, 557 S.W. 2d 25 (Mo. App. 1977).

Petitioners thereafter sought habeas corpus from the Supreme Court of Missouri. That Court on October 12, 1977, issued orders staying issuance of the mandate of the Missouri Court of Appeals by which the convictions had been affirmed, and considered petitioners' applications on written briefs in support and opposition thereto. On December 19, 1977, the Missouri Supreme Court denied each of petitioners' Applications for Habeas Corpus.

Petitioners then sought habeas corpus in the United States District Court for the Eastern District of Missouri. On January 11, 1978, the Honorable James H. Meredith, Chief Judge, entered a Memorandum Opinion and Order *Girard v. Goins*, 442 F. Supp. 1250 (E.D. Mo. 1978) by which that Court also denied habeas corpus and, in effect, affirmed the convictions.

On appeal to the United States Court of Appeals for the Eighth Circuit, that Court held that the punishment of between 10 and 40 days imprisonment did not render the convictions "serious" so as to require trial by jury. However, that Court held that fines in excess of $500 could not properly be imposed in the circumstances of the case absent the opportunity of a trial by jury. The Federal Appeals Court remanded the case

to the District Court for entry of an appropriate order (A. 43). On June 26, 1978, the District Court entered an Order pursuant to the mandate and judgment of the Eighth Circuit directing that habeas corpus should issue as to the petitioners unless, within 90 days of said order, the Circuit Court of the City of St. Louis either reduced the fines against the petitioners to an amount not exceeding $500 or grant to petitioners a new trial with a jury. The Order of the District Court further directed petitioners to appear before the Circuit Court of the City of St. Louis for proceedings consistent with the mandate and judgment of the Eighth Circuit (A. 28).

On July 18, 1978, the Circuit Court of the City of St. Louis entered an order granting a remission of the fines theretofore assessed, thereby limiting the fine against each petitioner to $500.

On the same day, petitioners filed new Applications for Habeas Corpus with the Missouri Court of Appeals, St. Louis District, alleging that the Circuit Court of the City of St. Louis was without authority to reduce the fines originally assessed on June 24, 1976 in order to comply with the orders obtained by petitioners in the Federal Courts. Petitioners claimed that the State Court had lost all jurisdiction over the case because more than 31 days had passed since entry of the original judgment. The Missouri Court of Appeals denied petitioners' Applications (A. 30).

Writs were then sought by each petitioner from the Supreme Court of Missouri in applications based upon the same grounds as had been raised in the Missouri Court of Appeals. After receipt of briefs in support and opposition to the applications, the Missouri Supreme Court also denied habeas corpus (A. 31).

Petitioners then filed an Amended Motion to Stay and Amended Application for Issuance of Writs of Habeas Corpus with the District Court of the United States for the Eastern District of Missouri, again alleging that the Circuit Court of

the City of St. Louis had no authority to comply with the mandate of the Eighth Circuit Court of Appeals and the Order of the District Court of the United States with regard to the reduction of the fines assessed against petitioners. On September 25, 1978, the District Court denied the Petitions for Habeas Corpus and further denied petitioners' request for certificates of probable cause (A. 32-36).

On September 25, 1978, petitioners filed a Notice of Appeal to the Eighth Circuit from the Order of the District Court denying habeas corpus and further filed a Motion to Stay execution of the sentences (A. 37, 38). On September 29, 1978, the Eighth Circuit entered its judgment denying petitioners' application for a certificate of probable cause and further denying petitioners' Motion for Stay (A. 39).

On October 2, 1978, petitioners filed with the Honorable Mr. Justice Blackmun an Application for Stay of Confinement as to the sentences imposed, which Application was denied by Order entered on October 3, 1978.

On November 3, 1978, all petitioners herein completed service of the sentences respectively imposed upon them (A. 3).

The Order of the Eighth Circuit Court of Appeals giving rise to this Petition for Certiorari is a denial by that Court of Petitioners' request for a certificate of probable cause to permit an appeal of the District Court's Order of June 2[illegible], 1978 (A. 39-40). The District Court's Order (A. 32-36) clearly sets forth the basis for that Court's rulings on petitioners' arguments and recites the matters before the Court giving rise to this proceeding.

This matter has been reviewed by the Missouri Court of Appeals, St. Louis District twice, by the Missouri Supreme Court twice, by the U. S. District Court twice, by the Eighth Circuit twice (all exclusive of rehearing motions, etc.), and also has been before the Circuit Justice on Motion to Stay.

QUESTION PRESENTED

Are the Orders of the Circuit Court of the City of St. Louis in response to the mandate and judgment of the United States Court of Appeals for the Eighth Circuit and the Order of the United States District Court for the Eastern District of Missouri, in conformity with the legal principle determined by this Court in *Taylor v. Hayes*, 418 U.S. 488 (1974)?

REASONS FOR NOT GRANTING THE WRIT

Even a casual reading indicates that the present Petition for a Writ of Certiorari sets forth no basis whatsoever for review of this case by our nation's highest Court. Respondent recognizes that a response to the present Petition may do no more than dignify arguments which are already patently spurious. Respondent has filed this brief out of an abundance of caution and in an effort chiefly to state reasons for denial of the writ in order to disperse the smokescreen which petitioners have created.

The first question petitioners claim is presented in this cause (as indicated by their "Questions Presented") is based upon the premise that the Circuit Court of the City of St. Louis lost all jurisdiction over the contempt proceedings thirty days after entry of the Order finding petitioners guilty. Petitioners, however, completely omit any discussion of this "question" in their "Reasons for Granting the Writ," and thus have apparently abandoned this so-called basis for relief.

Even though petitioners have abandoned this "question presented," respondent sets forth hereafter but a few of the many arguments and authorities which clearly and without question refute petitioners' position.

The present Petition for a Writ of Certiorari is derived from Applications for Writs of Habeas Corpus filed by petitioners in the United States District Court pursuant to Title 28 U. S. Code §2254. (Petitioners did not bother to include the Petitions in the Appendix.) Habeas corpus in the Federal Court is available to State Court prisoners *only* on the ground that petitioners were in custody in violation of the Constitution or laws or treaties of the United States. The question of the mechanics of the State Court reducing the fines assessed against petitioners in this case so as to comply with the Federal Court's orders obtained by petitioners is a question, not of Constitutional or federal law, but only of Missouri state law. Furthermore, this identical argument was rejected by both the Missouri Court of Appeals and the Missouri Supreme Court. It is not the province of a federal habeas court to re-examine questions of state law. *Rose v. Hodges*, 423 U. S. 19 (1975).

Any federal question of the power and jurisdiction of the Circuit Court of the City of St. Louis to affect a reduction of the fines assessed against petitioners was put to rest by this Court in the case of *Taylor v. Hayes*, 418 U.S. 488 (1974).

The second question petitioners claim is presented to this Court—and the only question argued by petitioners—is equally lacking in merit. Stripped of all erroneous and misleading references to any "evidentiary hearing," the question petitioners are actually seeking to raise is the question of the *sufficiency* of the evidence before the State Court to sustain the State Court conviction. Nowhere have petitioners ever indicated to the District Court, to the Eighth Circuit, nor to this Court, the factual issue for determination before the habeas Court which required an evidentiary hearing. Rather, petitioners have complained of the evidence in the Trial Court. Certainly, a question of the sufficiency of the evidence does not present a "special and important reason" that would warrant review by the United States Supreme Court. Moreover, it is established without exception that federal habeas corpus relief under Title 28 U. S. Code §2254 is not available to determine whether there was sufficient evidence to sustain a State Court conviction. *Butts v. Wainwright*, 575 F. 2d 576 (5th Cir. 1978); *Mapp v. Warden, New York State Correctional Institution for Women*, 531 F. 2d 1167 (2nd Cir. 1976); *White v. Wyrick*, 530 F. 2d 818 (8th Cir. 1976).

Petitioners do not in any wise demonstrate that the instant Petition presents to the Court a case in which certiorari should be granted for any of the reasons which are either specifically set forth, or implicit in the provisions of Rule 19 of this Court.

CONCLUSION

The Petition for a Writ of Certiorari is totally void of any basis for bringing before this Court for review the Order of the Court of Appeals denying petitioners' Application for a certificate of probable cause to permit an appeal. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 24th day of January, 1979 three copies of the Brief in Opposition to Petition for a Writ of Certiorari were personally delivered to Jerome J. Duff, Esq., 1139 Olive Street, Suite 302, St. Louis, Missouri 63101, Counsel for Petitioners. I further certify that all parties required to be served have been served.

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